On appeal against conviction and sentence, Mr. K. Chandra, counsel for the appellant, stated that at the time of the alleged offence on December 6, 1978, the presumption of trafficking under section 37(da) of the said Act did not apply and the entire prosecution's case depended on the cautioned statement marked exhibit P.7. Counsel also informed the Court that although the learned President's judgment was undated it was only supplied to him about two years after the trial. He pointed out that the learned President had difficulty in stating the grounds on which the accused was found guilty of trafficking because the only evidence of trafficking was in the cautioned statement which somehow was missing soon after the case was completed and was not available at the time he wrote his judgment two years later. In any case, it was also the submission of counsel that the learned President should not have admitted the cautioned statement because it was recorded by the investigating officer (P.W.2) whom he pointed out was very involved in the investigation of the whole case and was therefore not unbiased when he recorded the cautioned statement.

The learned Deputy Public Prosecutor conceded that as a matter of prudence the investigating officer in this case should not have recorded the cautioned statement, but stated that the learned President had found that the statement made by the accused was voluntary. He also submitted that the investigating officer was not actively involved in the case.

Having perused the recorded evidence, I was satisfied and agreed with learned counsel for the defence that the investigating officer (P.W. 2) was definitely involved in the investigation of this case so that there was likelihood of bias on his part. The former Court of Appeal in *Cheong See Leong* v. *Public Prosectuor*[1] has held, *'inter alia'*, that the principle that a judicial officer who is interested in a case should not sit to adjudicate upon it applies in regard to interpreters. In that case, the former Court of Appeal also held that the use of the Detective Sergeant, who was fully conversant with the material facts and was subsequently called by the prosecution as their principal witness to prove those facts, as an interpreter in taking the statement from the appellant in that case, offended against the elementary ideas of justice and therefore no reliance could be placed on the accuracy of that statement. Similarly in this case, following the former Court of Appeal's decision in that case, I considered that the use of the investigating officer, who was actively involved in the investigation of the case and who was subsequently called by the prosecution as a witness, as a recording officer in taking the cautioned statement from the appellant resulted in the likelihood of bias on his part. In the circumstances the learned President should have as a matter of law and fact held that the cautioned statement was inadmissible in evidence as it might result in a miscarriage of justice. In any case, as the cautioned statement (P.7) was missing it did not form part of the appeal records available for my perusal as an appellate judge. On the recorded evidence in the appeal records there was therefore only evidence to prove that the appellant was guilty of an offence of possession of dangerous drugs under section 12(2) of the said Act. I therefore quashed the conviction of the accused under section 39B(1) (a) of the said Act and substituted therefore a conviction under section 12(2) read together with section 39A of the said Act. The sentence of life imprisonment and two strokes of the rattan was altered by me to a sentence of three years' imprisonment with effect from the date of conviction and I also ordered that the appellant be punished with whipping of not less than six strokes.

Order accordingly.

Solicitor: *K. Chandra & Co.*

RAHIM BIN USOFF & ORS. v. PUBLIC PROSECUTOR

[A.Cr. J. (Shankar J.) January 31, 1984]
[Johore Bahru – Criminal Appeal No. 30 of 1982]

Criminal Law and Procedure – Appeal – Appeal against sentence – Appellant absent at hearing – Criminal Procedure Code (F.M.S. Cap. 6), s. 313 (ii).

In this case the appellants appealed against sentence. One of the appellants was absent at the hearing.

Held: (1) there was no material upon the record to suggest that the learned Magistrate had erred in principle and the appeals against sentence should be dismissed;

(2) in regard to the appellant who was absent the Court directed that it will in the circumstances refuse to consider the appeal further and order that the appeal be dismissed.

CRIMINAL APPEAL.

S. Bala for the lst, 3rd and 4th appellants.

Mohamed Elyas Majeed for the 2nd appellants

Khalid bin A. Manaf (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Shankar J.: This is an appeal against sentence by the lst, 2nd and 3rd Appellants and against conviction and sentence by the 4th Appellant.

I therefore adjourned the matter so far as he was concerned but the appeal proceeded as regards the other appellants.

I have heard the submissions of counsel for the appellants and the Deputy Public Prosecutor.

Even though some criticism was levelled against the grounds of judgment in that the learned Magistrate did not set out at length the material upon which he relied in support of the sentences which he imposed, I am satisfied that he was fully alive to all the material which was urged upon him in mitigation.

I have come to this conclusion because the sentences were imposed immediately after the learned Magistrate had been addressed at some length by counsel for the accused.

The Appellants are intelligent and educated people. It is a pity that they did not use their talents to improve the lot of their less fortunate brethren instead of swindling them.

The principles by which the Appellate Court is guided in an appeal against sentence is not whether it would have passed a different sentence from that given in the Court below but whether the learned Magistrate had fallen into error by taking into consideration matters which he should not have or by committing some error of law.

There is no material upon the record to suggest that the learned Magistrate had erred in principle and in all the circumstances of the case I have put aside the fact that had I been trying this case the sentences would have been very much more severe.

The appeals by the first and second Apellants are dismissed.

As regards the third Appellant, when this appeal came on for hearing on October 16, 1983 Mr. Bala who was his counsel disclosed that he was not present. The Deputy Public Prosecutor formally applied for a warrant for the arrest of the third Appellant and it then appeared that the Notice of Appeal had not been personally served upon him. The Deputy Public Prosecutor then applied for an Order that the Notice of Hearing be served on the third Appellant and on his bailor and his appeal was adjourned for hearing to December 11, 1983. When the matter came up on December 11, 1983 the third Appellant was still absent. Owing to a bereavement in the family his counsel Mr. Bala was also absent and a new date was accordingly fixed in January 1984 to proceed with the matter.

Thus this appeal has once again come up for disposal before the Court today. The third Apellant is still absent and so is his bailor.

In these circumstances I have exercised my powers under section 313(ii) of the Criminal Procedure Code and have accordingly directed that this Court will in all the circumstances refuse to consider this appeal further and hereby makes an Order that the appeal of the third Appellant Juraimi bin Suib is hereby dismissed.

In accordance with the provisions of section 285 of the Criminal Procedure Code the Registrar of this Court shall issue a warrant for the execution of the sentence passed by the learned President.

The disposal of the bail bond also remains to be considered and as to this I hereby certify this Judgement to the Learned President as provided by section 319 of the Criminal Procedure Code and do direct the learned President to require the bailor for the third Appellant to show cause why his bond should not be forfeited and to take such other action as the justice of the case requires.

As regards the fourth Appellant I have already held at the first hearing of this appeal that the conviction against him and the sentence be set aside and nothing more need to be said about him.

Order accordingly.

Solicitors: *Bala & Co.; Mohamed Elyas Majeed.*